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NO. 88-1450

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

DURA-CORP, a Pennsylvania Business Corporation,

Petitioner

vs.

RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,

Respondents

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16pp

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Reply to Respondents' Statement of the Case.....	1
Reply to Respondents' Argument:	
(a) Respondents' allegation that Constitutional Issues May Not Be Raised.....	3
(b) Respondents' Waiver/ Estoppel Argument.....	4
(c) Respondents' "Mootness" Argument.....	5
(d) Respondents' Argument Concerning the Propriety of the §3 Stay Order.....	6
(e) Respondents' Argument Concerning Forum Non Conveniens.....	8
Affidavit of Mailing.....	11

TABLE OF AUTHORITIES

Case Law	Pages
Acton Corp vs. Borden, Inc. 670 F.2d 377 (1st Cir. 1982).....	10
Bauhinia Corp vs. China National Machinery & Equipment, 819 F.2d 247 (9th Cir. 1987).....	10
Bremen vs. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct. 1907 (1972).....	10
Gulf Oil vs. Gilbert, 330 U.S. 591, 678 S.Ct. 893 (1947).....	8, 9
Gulf Stream Aerospace Corp. vs. Mayacamas Corp., _____ U.S. _____, 108 S. Ct. 1133 (1988).....	5
Kremans vs. Bartley, 431 U.S. 119; 97 S. Ct. 1709 (1977).....	5
Maria Victoria Navieria, S.A. vs. Cementos Del Valle, 759 F.2d 1027 (1985).....	9, 10
McCreary Tire and Rubber Co. vs. CEAT, 501 F.2d 1032, (3rd Cir., 1974).....	7

TABLE OF AUTHORITIES (cont'd)

	Pages
Moses H. Cone Memorial Hospital vs. Mercury Construction Corp. 460 U.S. 1, 103 S.Ct. 927 (1983).....	9
Scherk vs. Alberto-Culver Co., 417 U.S. 506, 54 S.Ct. 2449 (1974).....	9, 10
Sedco, Inc. vs. Petroleas Mexicano's Oil Co., 767 F.2d 1140 (5th Cir., 1985).....	7
Spring Hope Rockwool vs. Industrial Clean Air, Inc., 504 F.Supp. 1385, 1389, (E.D.N.C., 1981).....	9, 10
Steagald vs. United States, 451 U.S. 209, 208-211, 101 S.Ct. 1642, 1645-47 (1981).....	4
United States vs. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585. 2589 (1975).....	4
Zosky v. Boyer 856 F.2d 554 (3rd Cir. 1988).....	5, 9

Statutes

USCS Conventions, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II(3).....	6, 7, 8

TABLE OF AUTHORITIES (cont'd)

	Pages
Convention on the Recognition and Enforcement of Foreign Arbitral Awards: 9 U.S.C.S.§208.....	4
Federal Arbitration Act 9 U.S.C.S. §3.....	7, 8
United States Constitutional Amendment XIV, Section 1.....	3
United States Constitution, Article VI, Clause 2.....	4

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents therein have accused the Petitioner of alleging facts dehors the record (Brief in Opposition to Petition for Writ of Certiorari at p. 3; "Brief in Op"), and have concluded, without authority or rationale, that "the only key facts relevant to the current Petition for Writ of Certiorari include the arbitration clause and the Affidavit of Angelo Risi which was timely filed..."Id. at 4.

This blatant attempt to misstate and misapply the facts of this case must be exposed. First and foremost, the Risi Affidavit was not timely filed. To the contrary, it was filed in contravention of F.R.C.P. 6(d) in the District Court on February 9, 1986, nearly two months after the filing of their Motion to Stay Proceedings (Docket Entry Sheet, p.301a.). Both the District Court and the Third Circuit ignored this late filing.

The "key" facts abovementioned have been misplaced by Respondents. They may be

the only key facts relevant to the issue of arbitrability, but this issue is not involved in the instant Petition. Conversely, there are many more key facts which are of record and which are material and relevant to the issues which are involved in this case.

Contrary to Respondents derogations, all factual allegations made by Petitioner are of record in the Courts below. None of them have ever been opposed or contested by Respondents. Many of them were adopted by the District Court in its Opinion. More of them have been stated by Respondents in their Brief in Opposition. Because Respondents have failed to designate which of Petitioners allegations putatively contain facts "not of record", a specific response thereto is practically impossible and the accusation should be totally disregarded.

Last but not least, Respondents have alleged that "no affidavits were filed on behalf of Plaintiff Dura-Corp...opposing the location of arbitration" prior to the District Court Order. Brief in Op. at p.3.

This statement is an obvious misrepresentation of a material fact, and typifies the general unreliability of Respondents' Brief. (see eg. Affidavit of Thomas R. Eddy, Plaintiff's Sur Reply Brief, Exhibit "C").

REPLY TO RESPONDENTS' ARGUMENT:

(a) **RESPONDENTS' ALLEGATION THAT CONSTITUTIONAL ISSUES MAY NOT BE RAISED.**

Respondents allege that "Dura-Corp waited until the filing of its Petition in this Court to first raise constitutional arguments..." (Brief in Op. p. 5).

Contrary to Respondents' allegation, the record clearly shows that every argument raised by Petitioner here was advanced in the Courts below. Petitioner cited the 14th Amendment only in connection with its forum non conveniens argument. Whether principles of fairness under the 14th Amendment are the roots of the doctrine of forum non conveniens is not in question. The real issue is whether the District Court erred in refusing to weigh the jurisdictional contacts of the parties (see Petition at p. 34-35).

The Supremacy clause (U.S. Const. Art. Vi, Cl. 2) was cited incidentally by Petitioner as authority for §208 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The source of authority for §208 is likewise not in question. The real issue in this regard is whether the District Court Order, by virtue of §208, violates the Convention.

(b) **RESPONDENTS' WAIVER/ESTOPPEL ARGUMENT**

Respondents contend that, because Petitioner opposed Respondents' Motion to Quash Appeal in the Third Circuit, it is now estopped or has waived its right to challenge the jurisdiction of the Third Circuit to hear the appeal in the first instance. (Brief in Op. at p. 6).

In the case at bar, the Third Circuit created the jurisdictional inconsistency raised in the instant Writ[1] . The District Court granted a §3 Stay Order which under

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[1] Neither Steagald vs. United States, 451 U.S. 209, 208-211, 101 S. Ct. 1642, 1645-47 (1981) nor United States vs. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 2589 (1975), cited by Respondents in support of their Waiver/Estoppel argument, is apposite.

Zosky, infra, is interlocutory and non-appealable. The Third Circuit affirmed the District Court thereby tacitly sustaining appellate jurisdiction.

Contrary to Respondents' contention, Petitioner has argued that the Third Circuit was compelled to either sustain Appellate jurisdiction and reverse the District Court order, or decline Appellate jurisdiction[2].

(c) **RESPONDENTS' "MOOTNESS" ARGUMENT.**

Respondents have taken the position that the issue of the Third Circuit's Appellate jurisdiction is "moot" because if successful, "Petitioner would still be required to proceed to arbitration under the same District Court Order" [3].

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[2] Pursuant to the Third Circuit's ruling in Zosky vs. Boyer, 856 F.2d 554 (3rd Cir. 1988) and this Court's ruling in Gulf Stream Aerospace Corp. vs. Mayacamas Corp., __U.S. 108 S.Ct. 1133 (1988).

[3] Citing Kremans vs. Bartley, 431 U.S. 119 at 136; 97 S.Ct. 1709 at 1718-19 (1977). If Kremans, supra is applicable to the instant case, it supports Petitioner's position. In Kremans, a repeal in the challenged provisions of the Mental Health Procedures Act (Pa. Act No. 143) rendered the case moot. If the Order in the case at bar was not properly appealable, changes in applicable law by legislative enactment or by judicial decision could affect the rights of the parties. This is precisely what happened in Kremans, supra.

Respondents "mootness" argument is an attempt to distract this Court's attention from the two real issues in this case. The first issue is whether the District Court Order violates the Convention. The second is whether the District Court erred in refusing to weigh the jurisdictional contacts of the parties under the doctrine of forum non conveniens.

As stated, the Third Circuit created the appellate jurisdiction question in this case by summarily affirming the District Court Order. The issue was raised by Petitioner merely to demonstrate the inconsistency of the Third Circuit's ruling.

(d) RESPONDENTS' ARGUMENT CONCERNING THE PROPRIETY OF THE §3 STAY ORDER

True to form, Respondents again misstate Petitioner's argument. Petitioner has never argued that "(b)ecause the Convention does not contain a provision for stay of arbitration, such an order is inconsistent with the Convention." (Brief in Op. at 15-16). Petitioner has always maintained that Article II(3) of the Convention precludes

the issuance of a §3 stay order in an on-going case arising thereunder. Thus the District Court's granting of a §3 stay order was "inconsistent" with the Convention under §208 and cannot be sustained.

Sedco, Inc. vs. Petroleas Mexicano's Oil Co., 767 F.2d 1140 (5th Cir. 1985) cited by Respondents at p. 17 of their Brief, exemplifies the need for clarification of this confusing issue[4].

Respondents have stated in their Brief in Op. at p. 18 that Petitioner's quotation from McCreary Tire and Rubber Co. v. CEAT, 501 F.2d 1032 (3rd Cir. 1974) is "out of context, citing only from a portion of the Opinion dealing with foreign attachment"

Petitioner contends that its quotation was correct and proper. In that case, McCreary commenced an action in State Court by filing a Praecipe and Complaint in For-

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[4] The Court in Sedco reached its conclusion by relying exclusively on §3 of the FAA. The Court ignored the clear applicability of Article II(3) of the Convention while stating that Article II(3) of the Convention "must be enforced according to its terms over all prior inconsistent rules of law. (Id. at 1145, emphasis added).

eign Attachment. After removal by CEAT, the District Court denied a motion by CEAT to dissolve the foreign attachment and to stay the case pending arbitration. On appeal, the Circuit Court held that it was error to deny the motion for a stay in disregard of the Convention. Id. at 1037. Paradoxically, the Court then went on to state that:

> "...Unlike §3 of the Federal Act, Article II(3) of the Convention provides that the court of a contracting state shall "refer the parties to arbitration" rather than "stay the trial of the action." Id. at 1038.

This holding further evidences the need for this Court to address the issues presented in the instant Writ.

(e) RESPONDENTS' ARGUMENT CONCERNING FORUM NON CONVENIENS.

Respondents boldly state that this Court's decision in Gulf Oil vs. Gilbert, 330 U.S. 591, 67 S.Ct. 839 (1947), "(c)learly has no application to ... and is distinguishable from the case at bar." (Brief in Op. at p. 20-21).

No rationale is offered to support this

position. It is Petitioner's strong contention that Gulf Oil, supra, is clearly applicable to the case at bar and is dispositive of the issue of forum non conveniens. See eg Maria Victoria Navieria, S.A. vs. Cementos Del Valle, 759 F.2d 1027 at 1031 (1985)[5].

Respondents' also argue that:

> "The Courts which have considered the doctrine of forum non conveniens in the context of a site for arbitration have found the doctrine is either not applicable to arbitration, or only applicable to where the Federal Court action to compel arbitration should be prosecuted." (citing Spring Hope Rockwool vs. Industrial Clean Air, Inc., 504 F. Supp. 1385, 1389 (E.D.N.C., 1981 and Maria Victoria Naviera S.A. vs. Cementos Del Valle, 759 F.2d 1027, 1031 (2nd Cir. 1985). (Brief in Op. at p. 22-23).

Spring Hope, supra, is distinguishable from the instant case. There the District Court refused to apply the doctrine of forum non conveniens stating that the application

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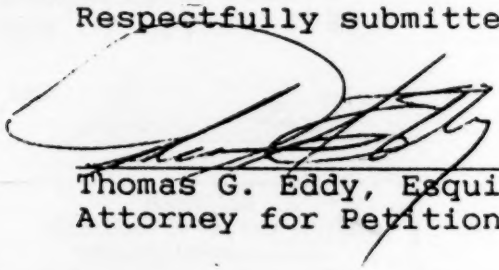
[5] Respondents cite Scherk vs. Alberto-Culver Co., 417 U.S. 506, 54 S.Ct. 2449 (1974) and Moses H. Cone Memorial Hospital vs. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927 (1983). Neither of these cases stand for the proposition for which they were cited, ie., that the District Court's decision to stay proceedings and concurrently to direct arbitration in Canada "clearly is in accord with later discussions of this Court..." (Brief in Op. at p. 21).

"is not authorized under the (Federal Arbitration) Act." Id. at 1389. Be that as it may, the doctrine of forum non conveniens could not have been applied in that case because it is available only in situations involving forums in different countries. Gulf Oil, supra; Maria Victoria Naviera, S.A., supra. Moreover, the holding in Spring Hope contravenes higher and more recent case law[6].

The Court in Maria Victoria Naviera, S.A., supra, correctly stated the rule at 1031 as follows:

> "We hold squarely that District Courts have the power to dismiss a petition to compel arbitration on the grounds of forum non conveniens."

Respectfully submitted,



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[6] Bremen vs. Zapata Off-Shore Company, 407 U.S. 1, 92 S.Ct. 1907 (1972); Sherk, supra; the New York cases which have addressed the issue (see Petition at pp. 31-37); Bauhinia Corp vs. China National Machinery & Equipment Co., 819 F.2d 247 (9th Cir. 1987), Acton Corp vs. Borden, Inc., 670 F.2d 377 (1st Cir. 1982), AND Maria Victoria Naviera, S.A., supra (2nd Cir., 1985).

AFFIDAVIT OF MAILING

I, THOMAS G. EDDY, ESQUIRE, having been duly sworn according to law, depose and say that I sent by Federal Express the original and 39 copies of the Reply to Brief in Opposition to Petition for Writ of Certiorari addressed to Clerk, Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543 on this 10th day of April, 1989.

Thomas G. Eddy, Esquire

Sworn to and subscribed before
me this 10th day of April, 1989

Rosemarie E. Sawicki
Notary Public

Notarial Seal
Rosemarie E. Sawicki, Notary Public
Pittsburgh, Allegheny County
My Commission Expires Jan. 18, 1992
Member, Pennsylvania Association of Notaries